

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 11, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANDREA J. CLARE, individually,

Plaintiff,

v.

KEVIN P. CLARE, individually,

Defendant.

NO. 4:18-cv-05045-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION TO
COMPEL AND FOR
ATTORNEY'S FEES; DENYING
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER**

Before the Court are opposing motions: Plaintiff's Motion to Compel and for Attorney's Fees, ECF No. 83, and Defendant's Motion for Confidentiality and Protective Order, ECF No. 87. The motions were considered without oral argument. Plaintiff is represented by George Telquist. Defendant is proceeding *pro se*.

FACTS AND PROCEDURAL HISTORY

Plaintiff Andrea J. Clare filed the above-captioned suit on March 31, 2018. ECF No. 1. Defendant Kevin P. Clare filed an Answer on April 20, 2018. ECF No. 9. Defendant filed a Motion to Dismiss on July 25, 2018. ECF No. 20. On September 18, 2018, the Court granted the motion for failure to state claims under the Wiretap Act, the Electronic Communications Privacy Act, and the Stored

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1 Communications Act (“SCA”), but gave Plaintiff leave to file an amended
2 complaint. ECF No. 34. Plaintiff filed a Second Amended Complaint on October
3 10, 2018. ECF No. 41. In the Amended Complaint, Plaintiff alleges that Defendant
4 intentionally accessed her emails in violation of the SCA. *Id.* at ¶ 4.1; *see also* ECF
5 No. 56 at ¶¶ 3–4. Defendant filed a Motion for Summary Judgment on September
6 24, 2019, which this Court granted on December 2, 2019. ECF Nos. 52, 60.
7 Plaintiff timely appealed, and the Ninth Circuit reversed and remanded the Order
8 on December 8, 2020. ECF No. 68.

9 On April 6, 2021, the parties filed a Motion for Entry of Confidentiality
10 Stipulation and Protective Order, which the Court denied on April 7, 2021. ECF
11 Nos. 81–82. The following day, Plaintiff filed a Motion to Compel and for
12 Attorney’s Fees, ECF No. 83, and Defendant filed a Motion for Confidentiality and
13 Protective Order. ECF No. 87.

14 The facts relevant to the present motions are as follows. On February 3,
15 2021, counsel for Plaintiff, Mr. George Telquist, propounded a set of
16 interrogatories and requests for production to Defendant and his then-counsel, KSB
17 Litigation. ECF No. 84 at 1. The discovery pertains to Defendant’s personal
18 financial information. ECF No. 88.

19 On March 8, 2021, Defendant’s counsel withdrew from representation,
20 leaving him *pro se*. ECF No. 77. On March 15, 2021, Mr. Telquist sent
21 correspondence to Defendant regarding the status of his discovery responses, to
22 which he responded that discovery was irrelevant. ECF No. 84 at 2, 4. Mr. Telquist
23 and Defendant held a teleconference on March 18, 2021 to resolve the dispute
24 without Court intervention. ECF No. 85. During the conference, Defendant did not
25 mention the need for a protective order but requested additional time to respond.
26 ECF No. 91-1. Mr. Telquist and Defendant agreed he would provide responses
27 within fourteen days, creating a new deadline of March 31, 2021. *Id.*; ECF No. 93
28 at 3.

1 On March 30, 2021, Defendant sent an email to Mr. Telquist demanding he
2 prepare a stipulated protective order “stating that any financial information sought
3 and/or produced in this case shall not be used for any purpose whatsoever in any
4 other case,” and that he would provide responses to discovery after the “protective
5 order has been approved and entered with the court.” ECF No. 91-1. In response,
6 Mr. Telquist stated: “I agree not to disseminate any of the responses to third
7 persons other than witnesses, expert and others who need[] the materials for
8 purposes of testifying and the development of the punitive damages award.” *Id.*
9 Mr. Telquist informed Defendant that he viewed his email as an untimely delay
10 tactic and stated that he would bring a motion to compel, and a motion for
11 attorney’s fees, if responses were not received by end of business on March 31,
12 2021. *Id.*

13 On March 31, 2021, instead of providing responses to discovery, Defendant
14 sent a proposed protective order to Mr. Telquist. ECF No. 84 at 4. Mr. Telquist
15 filed the Stipulated Motion for Protective Order with the Court on April 6, 2021.
16 ECF No. 81; ECF No. 84 at 3. On April 7, this Court denied the Motion for
17 Protective Order. ECF No. 82.

18 **DEFENDANT’S MOTION FOR CONFIDENTIALITY**
19 **AND PROTECTIVE ORDER**

20 Defendant now moves the Court to enter a confidentiality and protective
21 order pursuant to Fed. R. Civ. P. 26(c)(1). ECF No. 87 at 1. He asks that the Court
22 order that all financial information produced by him not be used or disseminated
23 outside the litigation and that the fruits of discovery be destroyed after conclusion
24 of the case. *Id.* In his supporting declaration, Defendant claims that “Plaintiff and
25 Plaintiff’s counsel previously disclosed my confidential information to an outside
26 party in previous litigation in order to gain an upper hand over me. It almost cost
27 me my career. As such I communicated that I require protection and confidentiality
28 in this litigation.” ECF No. 88 at 1.

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1 In response, Plaintiff argues that Defendant has refused to answer all
 2 discovery requests to date, even though Defendant's present Motion only seeks
 3 confidentiality with respect to his financial information. ECF No. 90 at 2. Plaintiff
 4 contends that the Court should deny the Motion because Defendant has failed to
 5 show good cause. Specifically, Plaintiff argues that Defendant failed to
 6 demonstrate a specific prejudice or harm that would result by answering the
 7 proposed discovery. *Id.* at 3. Plaintiff's counsel reiterates that Plaintiff has agreed
 8 not to disseminate any information outside the needs of the litigation in this case,
 9 and thus a protective order is not necessary. *Id.*

10 **PLAINTIFF'S MOTION TO COMPEL DISCOVERY**
 11 **AND FOR ATTORNEY'S FEES**

12 Plaintiff moves to compel Defendant to produce responses to interrogatories
 13 and requests for production initially sent to Defendant and his counsel on February
 14 3, 2021. ECF No. 84 at 1. Plaintiff also moves for attorney's fees under Fed. R.
 15 Civ. P. 37(a)(5) in the amount of \$810.00, for 3.6 billed hours.¹ ECF No. 84 at 3–4.

16 In response, Defendant argues that the Court should deny both motions
 17 because they are “moot,” since “Defendant has agreed to provide said discovery
 18 responses subject to the Court's ruling on Defendant's pending Motion for
 19 Confidentiality and Protection Order.” ECF No. 92 at 1. He argues that the filing of
 20 a protective order automatically stays discovery until an order is issued, and that he
 21 is now “simply waiting for the court's ruling on his protective order motion.” *Id.* at
 22 2. Defendant states that he will produce discovery answers as required, but that he
 23 wishes to produce “this highly sensitive information subject to a protection order
 24 which guarantees its confidentiality and non-dissemination.” *Id.* In addition,

25
 26 ¹ It is unclear how Plaintiff's counsel calculated a total of \$810.00 for 3.6 billed
 27 hours, given that his stated hourly rate is \$300.00. ECF No. 84 at 4.
 28

1 Defendant contends that attorney's fees are not warranted because "[he] attempted
2 to work with Plaintiff in good faith to obtain the protection and confidentiality
3 order, *after* [he] communicated that [he] agreed to produce the requested discovery
4 *subject to* a protection order." *Id.* (emphasis added). Defendant also contends that
5 his actions are "substantially justified," as that term is used under Rule
6 37(a)(5)(A)(ii), because he wants to ensure Plaintiff and her counsel do not use his
7 discovery responses outside of litigation. Defendant also argues that attorney's fees
8 are not appropriate because Plaintiff's counsel is "[Plaintiff Clare's] romantic and
9 business partner with whom she lives. It is unlikely that she is paying him for legal
10 services which creates an unusual circumstance." *Id.* at 3.

11 LEGAL STANDARD

12 I. Motion for Confidentiality and Protective Order

13 Federal Rule of Civil Procedure 26(b)(1) provides that a party may obtain
14 discovery regarding any non-privileged matter that is relevant to the subject matter
15 in the pending action. It is also well-established that "the fruits of pretrial
16 discovery are, in the absence of a court order to the contrary, presumptively
17 public." *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002).
18 However, a party may seek a protective order from the Court pursuant to Rule
19 26(c)(1), which allows courts to enter an order protecting a party or person from
20 "annoyance, embarrassment, oppression, or undue influence or expense." Motions
21 for a protective order must include a certification that the movant has in good faith
22 conferred or attempted to confer with the other affected parties in an effort to
23 resolve the dispute without court action. Fed. R. Civ. P. 26(c)(1); LCivR 37.
24 District courts are vested with broad discretion to determine whether a protective
25 order is appropriate and, if so, to what degree protection is warranted. *Seattle*
26 *Times Company v. Rhinehart*, 467 U.S. 20, 36 (1984). "A motion for protective
27 order is timely if made prior to the date set for the discovery." *Seminara v. City of*
28 *Long Beach*, Nos. 93–56395, 93–56512, 1995 WL 598097, *3 (9th Cir. Oct. 6,

1 1995) (citing *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 413 (M.D.N.C.
2 1991)).

3 In the case where a protected order is not stipulated to by the parties, the
4 court must make a determination of good cause. *In re Roman Catholic Archbishop*,
5 661 F.3d 417, 424 (9th Cir. 2011); *Phillips*, 307 F.3d at 1211 n.1. “The burden is
6 on the party seeking the order to ‘show good cause’ by demonstrating harm or
7 prejudice that will result from the discovery.” *Rivera v. NIBCO, Inc.*, 364 F.3d
8 1057, 1063 (9th Cir. 2004). This requires a showing that “specific prejudice or
9 harm will result” if a protective order is not granted. *In re Roman Catholic*
10 *Archbishop*, 661 F.3d at 424. “[B]road allegations of harm, unsubstantiated by
11 specific examples of articulated reasoning” do not satisfy the Rule 26(c) standard.
12 *Phillips*, 307 F.3d at 1211 (citing *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d
13 470, 476 (9th Cir. 1992)). If the court finds that “particularized harm will result
14 from disclosure of information to the public, then it balances the public and private
15 interests to decide whether a protective order is necessary.” *Id.*

16 In addition, *pro se* litigants are held to the same standards as represented
17 parties with respect to complying with court rules and orders. *See, e.g., King v.*
18 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the same
19 rules of procedure that govern other litigants.”), *overruled on other grounds by*
20 *Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012).

21 **II. Motion to Compel Discovery and for Attorney’s Fees**

22 Under Federal Rule of Civil Procedure 37, a party may move for an order
23 compelling discovery where a party fails to answer written interrogatories or
24 requests for production. Fed. R. Civ. P. 37(a)(3)(B)(iii), (iv). Motions to compel
25 must include a certification that the movant has in good faith conferred or
26 attempted to confer with the other affected parties in an effort to resolve the
27 dispute without court action. Fed. R. Civ. P. 37(a)(1); LCivR 37. Responses to
28 interrogatories and requests for production are due within thirty days of service

1 pursuant to Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), absent stipulation by the parties
2 or court order.

3 The Court must award the successful movant of a motion to compel
4 “reasonable expenses incurred in making the motion, including attorney’s fees.”
5 Fed. R. Civ. P. 37(a)(5)(A). There are three exceptions to the rule. *See* Fed. R. Civ.
6 P. 37(a)(5)(A)(i)–(iii). A court must not order payment if (1) the movant filed the
7 motion before attempting to confer with the opposing party in good faith; (2) the
8 opposing party’s non-disclosure was “substantially justified”; and/or (3) other
9 circumstances make an award of expenses unjust. *Id.* “Substantial justification”
10 exists where the losing party shows that it raised an issue about which reasonable
11 minds could genuinely differ on whether that party was bound to comply with the
12 discovery rule. CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. CIV. § 2288
13 (3d ed.).

14 Reasonable attorney’s fees are calculated based on the traditional “lodestar”
15 method. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). The
16 court determines a fee under the lodestar method by multiplying “the number of
17 hours reasonably expended on the litigation . . . by a reasonable hourly rate.”
18 *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar figure is
19 presumptively reasonable. *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 488
20 (9th Cir. 1988). The moving party of a successful motion to compel is entitled to
21 attorney’s fees “incurred,” regardless of whether the client would be required to
22 pay them. *See Roush v. Berosini*, No. 02–15707, 2003 WL 21267453 *1 (9th Cir.
23 2003). An award of attorney’s fees may be based on affidavits of counsel, so long
24 as the affidavit is “sufficiently detailed to enable the court to consider all the
25 factors necessary in setting the fees.” *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 946
26 (9th Cir. 1993) (quoting *Williams v. Alioto*, 625 F.2d 845, 849 (9th Cir. 1980), *cert.*
27 *denied*, 450 U.S. 1012 (1981)).

DISCUSSION

I.

In this case, Defendant failed to make a showing that “specific prejudice or harm will result” if a protective order is not issued. *See In re Roman Catholic Archbishop*, 661 F.3d at 424. Defendant contends that Plaintiff Clare and Mr. Telquist misused his information in prior litigation, which “almost cost [him his] career.” ECF No. 88 at 1. However, as mentioned, “broad allegations of harm, unsubstantiated by specific examples of articulated reasoning” do not satisfy the Rule 26(c) standard. *Phillips*, 307 F.3d at 1211 (citing *Beckman Indus., Inc.*, 966 F.2d at 476). Defendant did not provide specific examples of harm or prejudice that would occur absent a protective order. Vague allegations of misuse of discoverable information are insufficient, and particularly insufficient in this matter given the explicit representation by Plaintiff and her counsel that they “agree not to disseminate any of the responses to third persons other than witnesses, expert and others who need[] the materials for purposes of testifying and the development of the punitive damages award.” ECF No. 91-1. Defendant’s broad allegations of misuse of discoverable information do not constitute specific prejudice or harm under Rule 26(c).

Defendant also failed to submit a certification under Federal Rule 26(c)(1) and Local Rule 37 to demonstrate he “has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action.” Fed. R. Civ. P. 26(c)(1); LCivR 37. In addition, the Motion for Protective Order is not timely, as it was made after the date set for discovery. *Seminara*, 1995 WL 598097 at *3. Consequently, the Court finds that a protective order is not appropriate.

As the Court stated in its first order denying the parties’ Motion for Entry of Confidentiality Stipulation and Protective Order, “when . . . the parties *agree* that certain information should remain confidential, it may be prudent for the parties to

1 enter into a written agreement setting forth what information shall remain private.
2 However, it is unnecessary for such an agreement to have this Court's imprimatur
3 to be valid." ECF No. 82 at 2–3 (emphasis added). Here, again, it is unnecessary
4 for the parties' agreement to have this Court's imprimatur to be valid. ECF No. 82
5 at 2. Accordingly, Defendant's Motion for Confidentiality and Protective Order is
6 denied.

7 II.

8 Plaintiff moves to compel Defendant to produce responses to interrogatories
9 and requests for production initially sent to Defendant and his former counsel on
10 February 3, 2021. ECF No. 84 at 1. Pursuant to Rule 33(b)(2) and 34(b)(2)(A),
11 Defendant's discovery responses came due on March 5, 2021, with an extension
12 granted by party agreement to March 31, 2021. ECF No. 91-1; ECF No. 93 at 3.
13 The rule-mandated discovery deadline of March 5, 2021, and the parties' agreed-to
14 deadline of March 31, 2021, have come and gone. As a result, the Court grants the
15 Motion to Compel.

16 Because the Court grants Plaintiff's Motion to Compel, there is a
17 presumption that the movant will be awarded reasonable attorney's fees. Fed. R.
18 Civ. P. 37(a)(5)(A). Defendant argues that his failure to produce discovery
19 responses was "substantially justified" due to his pending Motion for
20 Confidentiality and Protective Order. ECF No. 87. Defendant's Motion cannot
21 justify his failure to provide discovery responses, however, because the Motion is
22 untimely. In this case, Defendant's Motion for Confidentiality and Protective
23 Order was filed April 8, 2021, beyond the 30-day limit established by Rule
24 33(b)(2) and 34(b)(2)(A), and subsequent March 31, 2021 deadline agreed-to by
25 the parties. Here, reasonable minds cannot differ as to whether Defendant Clare
26 was bound to comply with the discovery rules. WRIGHT, ET AL., FED. PRAC. &
27 PROC. CIV. § 2288. As noted, *pro se* litigants must follow the same rules that
28

1 govern other litigants. Therefore, Defendant Clare's actions were not "substantially
2 justified."

3 Defendant Clare also argues that attorney's fees are not appropriate because
4 it is uncertain whether Plaintiff's counsel will charge his client for the time spent
5 preparing the Motion to Compel. However, the successful movant is entitled to
6 attorney's fees "incurred," regardless of whether the amount is paid by the client.
7 Accordingly, reasonable attorney's fees are warranted.

8 The Court finds that Mr. Telquist's declaration is sufficiently detailed for the
9 Court to consider all factors necessary in setting fees. *Henry, Inc.*, 983 F.2d at 946.
10 In his supporting declaration, Mr. Telquist states his rate is \$300.00 per hour and
11 that he has practiced law since 1997, with almost exclusive experience in civil
12 litigation. *Id.* at 4. Mr. Telquist's hourly rate is \$300, which is reasonable within
13 the local community. *Id.* Of the time entries provided, three pertain to the parties'
14 stipulated motion filed on April 6, 2021, which total \$420.00 for 1.4 hours. *Id.* An
15 additional three time entries pertain to conducting a Rule 37 conference—these
16 entries total \$240.00 for 0.8 hours. *Id.*

17 The Court finds that time spent filing a stipulated protective order and
18 complying with the court rules are not compensable. As a result, the Court grants
19 Plaintiff's Motion for Attorney's Fees with a reduced award. The entries pertaining
20 only to the present Motion to Compel and acquiring discovery responses from
21 Defendant Clare after the discovery deadline totals 1.35 hours. This total
22 multiplied by the hourly rate of \$300 establishes a lodestar figure of \$405.00. This
23 amount is presumptively reasonable. *Cunningham*, 879 F.2d at 488. Defendant is
24 ordered to pay this amount to Plaintiff within thirty days and provide discovery
25 responses within ten days of this Order.

26 The Court reminds the parties that they are expected to work cooperatively
27 to complete discovery to reach the merits in this matter. Should other discovery
28 disputes arise that the parties cannot resolve through the meet and confer process,

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1 the parties are reminded they can seek expedited and informal resolution of a
2 disagreement and dispense with motion practice. The Court urges the parties to
3 resolve discovery disputes, where possible, without Court intervention and to
4 reserve motion practice for truly intractable disputes.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion to Compel and for Attorney's Fees, ECF No. 83, is
7 **GRANTED.**

8 2. Defendant's Motion for Confidentiality and Protective Order, ECF
9 No. 87, is **DENIED.**

10 3. Defendant shall provide responses to Plaintiff's First Set of
11 Interrogatories and Requests for Production within **ten days** from the date of this
12 Order.

13 4. Defendant is ordered to pay \$405.00 in reasonable attorney's fees to
14 Plaintiff within **thirty days** from the date of this Order.

15 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
16 file this Order and provide copies to counsel and pro se Defendant.

17 **DATED** this 11th day of June 2021.



21
22

A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

23 Stanley A. Bastian
24 Chief United States District Judge
25
26
27
28